In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1710

KAN KAM LIN, ET AL., PETITIONERS

v.

DOMINICK RINALDI, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 493 F. 2d 1229. The opinion of the district court (Pet. App. A) is reported at 361 F. Supp. 177.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on March 25, 1974. The petition for a writ of certiorari was filed on May 15, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the United Nations Protocol Relating to the Status of Refugees, petitioners, Chinese alien seamen who are illegally in this country, are entitled as refugees to relief from deportation.

STATEMENT

Petitioners are natives of the Republic of China. Subsequent to the ouster of the Nationalist government from mainland China, they migrated to Hong Kong. There they obtained papers for employment as seamen and were so employed until entry into the United States.

Petitioners were thereafter served with an Order to Show Cause, charging that they were deportable since they had either entered this country illegally or had overstayed the period authorized for non-immigrant crewmen. Following a hearing at which each petitioner conceded the factual allegations in the Order to Show Cause, they were ordered deported.

Subsequent to the deportation orders and pursuant to the United Nations Protocol Relating to the Status of Refugees, petitioners filed applications for political asylum as refugees. The District Director of the Immigration and Naturalization Service denied each of these requests.[1]

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[1] The complex procedural background of the instant petition is fully set forth in the opinion of the district court (Pet. App. A, pp. 3a-8a). Briefly stated, petitioner Lin's request for asylum was forwarded to the State Department on May 19, 1972. On October 19, 1972, the Service advised Lin that he had failed to establish that he would be persecuted on the basis of race, religion or political opinion if returned to Hong Kong (Pet. App. A, p. 3a, n. 2). On November 10, 1972, petitioners Lin, Yi Chun Cheng, and Siu filed an application for a preliminary injunction in the United States District Court for the District of New Jersey (Civ. No. 1823-72). The application was consolidated with a complaint filed by petitioner Lam (Civ. No. 1862-72). On December 18, 1972, the court remanded both applications to the Immigration and Naturalization Service for further review, with directions to take into consideration the definition of the word "refugee" in Article I(A)(2) and with reference to Article 32 of the Protocol Relating to the Status of

Petitioners thereafter brought actions in the United States District Court for the District of New Jersey against the District Director and the Secretary of State to enjoin the deportations on the ground that the denial of asylum was arbitrary, capricious, and illegal. The district court, in an extensive opinion, granted summary judgment for the respondents (Pet. App. A). The court held that the term "lawfully in [the] territory" as used in Article 32(1) of the Protocol was intended to require that a refugee be in the contracting state in compliance with the immigration laws of that country. The court concluded that since petitioners were, of their own admission, illegally in the United States, they were not entitled to the benefits of the Protocol. The court of appeals affirmed (Pet. App. B).

ARGUMENT

At the end of World War II there were some eight million displaced persons in Europe; seven million of these had accepted repatriation, leaving one million as a problem of international concern. See, *Displaced Persons in Europe*, S. Rep. No. 950, 80th Cong., 2d Sess. 2-3, 8. In view of this, on March 2, 1948, the United Nations Economic and Social Council adopted Resolution 116VI(d) requesting the Secretary General of the United Nations to undertake a study of the existing situation in regard to the protection of stateless persons and make recommendations to remedy these problems.

Refugees. On February 5 petitioners Lin, Yi Chun Cheng, Siu, and Lam were advised by the District Director that the Protocol did not cover them since they had not established, pursuant to Article 32(1), that they were lawfully in the United States (Pet. App. A, p. 4a). On February 16, 1973 the present action was commenced.

Petitioners Chan, Cheung, and Yu Fung Cheng were not parties to the original district court action, they filed their complaints after the respective denials for asylum (Pet. App. A, pp.7a-8a).

As a result of the Secretary General's study, the Economic and Social Council appointed an Ad Hoc Committee, consisting of representatives of thirteen governments, to draft a convention relating to the international status of refugees and stateless persons. The revised draft was completed on August 25, 1950, and the convention was adopted by the conference of plenipotentiaries which met in Geneva in July 1951. The convention defines a "refugee" in Article 1(A)(2) as any person who

> * * * owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Article 32 of the convention provides in relevant part:

> The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

The United States became a Contracting State under the provisions of the United Nations Protocol Relating to the Status of Refugees on November 1, 1968. 19 U.S.T. 6257.

Petitioners claim that under this Protocol they are entitled to "refugee" status and accordingly, may not be expelled except on grounds of national security or public order. This contention is refuted by the express terms of the Protocol and its historical background.

As noted above, Article 32 only benefits those refugees "lawfully in [the] territory" of the contracting state. The Article is inapplicable to petitioners, who are admittedly in this country in violation of its immigration laws.[2] In his commentary on the Convention, Professor Robinson observed that:

> Par. 1 deals with the expulsion of refugees lawfully in the country, which means that no such safeguards exist in favor of refugees unlawfully in the territory of the state, except those set up in Art. 31(2) and Art. 33. In other words, while, as a rule, refugees lawfully in a country may not be expelled except on the grounds and in the manner prescribed in Art. 32, illegal refugees may be expelled without such grounds, and without the guarantee of par. 2, except insofar as Art. 33(1) applies and insofar as Art. 31 requires the states to grant illegals sufficient time and facilities to obtain admission into another country; once the facilities have been granted and the reasonable period has expired, expulsion (except to a dangerous area) may be ordered on the basis of an administrative decision and the procedure established for such cases at the discretion of every Contracting State.***
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> It cannot be considered expulsion if a refugee who was admitted to a Contracting State on a temporary basis with a travel document issued by another Con-

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[2]Petitioners argue that this interpretation renders the Protocol "a nullity since ordinarily the only persons who would apply for the benefits of the Treaty would, by necessity, be in the United States in violation of the Immigration Laws" (Pet. 16). Contrary to this claim, four of the petitioners in this case entered this country lawfully as alien crewmen and could have properly made their claim under the provisions of the Protocol during the period of lawful admission; however, they did not do so.

> tracting State, is refused permission to stay there beyond the authorized period. Technically he would be a refugee "unlawfully" in the country, although he would not fall into the category of illegal refugees of whom Art. 31 treats. [Robinson, *Convention Relating to the Status of Refugees—Its History, Contents and Interpretation*, pp. 156-157 (1953).]

The legality of the refugee's presence is determined by the immigration laws of the country in which he claims "refugee" status. As the Ad Hoc Committee Report states:

> The expression "lawfully within their territory" throughout this draft Convention would exclude a refugee who while lawfully admitted has overstayed the period for which he was admitted or was authorized to stay or who has violated any other condition attached to his admission or stay. [*Ad Hoc Committee on Statelessness and Related Problems, Report*, U.N.E.C.O.S.O.C. at 47, U.N. Doc.E/1618/ Corr. 1; E/AC. 32/5/Corr. 1 M (March 2, 1950).]

A later report of the Committee again emphasized that the refugee must be in the country in conformity with that country's immigration laws. The report states:

> The Committee decided it was not always necessary to insert in the text definitions of expressions used. However, since some question was raised as to the phrase "lawfully in the territory," the Committee expressed the view that, in any event, a Contracting State may consider that a refugee is no longer lawfully in its territory if he is in contravention of terms imposed as a condition of his admission or sojourn. [*Ad Hoc Committee on Statelessness and Related Problems, Report*, U.N.E.C.O.S.O.C. at 11, U.N. Doc. E/1850; E/AC. 32/8 (August 25, 1950).]

The legislative history of the Protocol in the Senate also indicates that this country's immigration laws would govern its application. In testimony before the Senate Committee on Foreign Relations, Laurence A. Dawson, Acting Deputy Director of the Office of Refugee and Migration Affairs, Department of State, stated:

> * * * [W]hile the concept of guaranteeing safe and humane asylum is the most important element of the Protocol, accession does not in any sense commit the contracting state to enlarge its immigration measures for refugees. Rather, the asylum concept is set forth in the prohibition against the return of a refugee in any manner whatsoever to a country where his life or freedom would be threatened; and the prohibition under Article 32 against the deportation of a refugee lawfully in the territory of a Contracting State to any country except in cases involving national security or public order. The deportation provisions of the Immigration and Nationality Act, with limited exceptions, are consistent with this concept. The Attorney General will be able to administer such provisions in conformity with the Protocol without amendment of the Act. [Appendix, 90th Cong. 2d Sess., Executive Report No. 14, Protocol Relating to Refugees, September 30, 1968, at 6.]

The courts below properly held that the status accorded refugees must be viewed in the context of the legality of their presence under the immigration laws of this country. See also *Ming* v. *Marks*, 367 F. Supp. 673

(S.D. N.Y.). Since petitioners admittedly are in this country illegally, the benefits of the Protocol are not available to them.[3]

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[3]Petitioners also argue that new regulations governing the issuance of travel documents support their claim. Specifically, they rely on 8 C.F.R. 223a.3, which states:

> Any alien physically present in the United States may apply for a refugee travel document if he believes he is a refugee. A refugee travel document shall be issued to a refugee whose presence in the United States is lawful unless compelling reasons of national security or public order otherwise require. A refugee travel document may be issued in the exercise of discretion, to any other refugee unless reasons of national security or public order otherwise require; sympathetic consideration shall be given to such an application unless the Service intends to expel or exclude the alien from the United States. * * *

Petitioners reason that this regulation permits all refugees to retain travel documents, which would permit such refugees to reenter the United States. Hence, they conclude that if the refugee can leave and return, he ought likewise be permitted to remain without leaving. As the district court observed in *Ming* v. *Marks*, *supra*, 367 F. Supp. at 680:

> The fallacy, however, is that it is not "obvious" at all that "all refugees" may get travel documents. Indeed, the regulation, in language quite similar to the Convention, provides that the travel document shall issue only if the presence of the refugee in this country is "lawful." The fact that this country may, in its discretion, issue documents to refugees here unlawfully, is not only in conformance with Article 28 of the Convention, but is of no help to the plaintiffs, since the Convention indicates that the purpose of this discretionary power was to permit travel by those who cannot be deported because they will not be accepted elsewhere.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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